

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

STATE OF ARKANSAS,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION
AGENCY, *et al.*,

Respondents.

Case No. 16-4270 (and
consolidated cases)

**JOINT RESPONSE OF STATE OF ARKANSAS AND ARKANSAS
AFFORDABLE ENERGY COALITION TO CONSERVATION
GROUPS' STATUS REPORT and OPPOSITION TO REQUEST
TO LIFT ABEYANCE**

Petitioners State of Arkansas and Arkansas Affordable Energy Coalition provide this joint response to the status report filed by Intervenor-Respondents National Parks Conservation Association and Sierra Club (collectively "Conservation Groups") and oppose the Conservation Groups' request for the Court to lift the abeyance and issue a scheduling order for the remaining briefs.

In the consolidated cases, Petitioners seek review of an Environmental Protection Agency (EPA) federal implementation plan

(“FIP”), which was published in the Federal Register at 81 Fed. Reg. 66,332 (Sept. 27, 2016) and entitled “Promulgation of Air Quality Implementation Plans; State of Arkansas; Regional Haze and Interstate Visibility Transport State Implementation Plan.”

On March 8, 2017, this Court granted EPA’s unopposed motion to hold these consolidated cases in abeyance while the parties explore options for resolving these cases without litigation. Pursuant to this Court’s order, the undersigned parties’ first status report was due to the Court on June 9, 2017. In their status report, the Conservation Groups argue that there is not a “viable path toward settlement” and that the abeyance should be lifted.

Arkansas filed a joint status report along with EPA and other petitioners. That report explained the considerable time and resources that all of the parties—including EPA, Arkansas, and numerous private parties—have dedicated to amicably resolving this litigation without the need to further tax this Court’s resources. Further, as stated in the joint status report, Arkansas has committed to submit a regional haze State Implementation Plan (“SIP”) to EPA within the next year. Once a

SIP is submitted to and approved by EPA, the FIP will be superseded and this litigation will be moot. Therefore, the undersigned parties renew the request that the Court continue to hold this litigation in abeyance and propose to file another status report on July 24, 2017.

The undersigned parties further state as follows:

1. The undersigned parties support all points raised in the “EPA Response to Environmental Petitioners’ Status Report Seeking to End the Litigation Abeyance” that was filed by EPA today, June 22, 2017. Doc. No. 4550071.

2. As stated in the joint status report filed on June 9, 2017, abeyance of this litigation is necessary to ensure that the parties are able to adequately focus on and dedicate resources to alternatives to litigation.

3. During the abeyance, Arkansas has participated in no less than thirteen (13) meetings or conference calls with various parties to discuss settlement and the SIP submittal.

4. Specifically, representatives from the Conservation Groups participated in a conference call on May 2, 2017, with staff members

from the Arkansas Department of Environmental Quality (ADEQ) and legal counsel for Arkansas. ADEQ is the state agency with the authority to submit a SIP on behalf of the State of Arkansas.

5. At the conclusion of the May 2, 2017, conference call, ADEQ invited the Conservation Groups to provide staff with technical information to be considered in the preparation of a regional haze SIP. Additionally, ADEQ and Arkansas's legal counsel reiterated a desire to have open communication with the Conservation Groups' technical experts and legal counsel.

6. Arkansas was encouraged by the tone and substance of the May 2, 2017, conference call and was disappointed that the Conservation Groups' June 9, 2017, filing erroneously characterized those efforts as not in "good faith" and mistakenly claimed that Arkansas had "no intention of seeking to come to the table or account for the interests of the Conservation Groups."

7. In a discussion with all parties, except Domtar, on May 11, 2017, the Conservation Groups did not oppose a settlement structure in which a SIP revision would be the key mechanism for implementing a

settlement. In that discussion, ADEQ reiterated its request for technical information from all parties to assist in preparing the SIP.

8. On May 26, 2017, the Conservation Groups provided technical information to ADEQ regarding proposed controls at Entergy's White Bluff Independence plants. ADEQ is currently evaluating the information as it prepares the SIP.

9. While the Conservation Groups assert that there is "no intention of seeking to come to the table or account" for their interests, the Conservation Groups have actively participated in the SIP development process. The Conservation Groups have drawn conclusions about the substantive contents of the final SIP revision before ADEQ has completed its technical analysis or review of the information that the Conservation Groups submitted.

10. Further, the undersigned parties have not been given a copy of the "substantive, written settlement proposal" referenced in paragraph 17 of the Conservation Groups' status report. And it is therefore impossible to claim, as the Conservation Groups do, that their proposal has been rejected and that settlement cannot be reached.

11. Additionally, while the Conservation Groups' status report focuses on the alleged health effects of air pollution from Arkansas power plants, it is undisputed that the regional haze program is not intended to promote public health. To the contrary, the regional haze program is designed to achieve purely aesthetic goals. 42 U.S.C. 7491(a)(1) ("prevention of any future, and the remedying of any existing, impairment of visibility").

12. Moreover, the most recent available visibility data indicates that Arkansas has already improved visibility beyond the 2018 reasonable progress goals established by the FIP for the first planning period. Indeed, the undisputed data establishes the following (all values in deciviews):

Wilderness Area	Final Regional Haze FIP Reasonable Progress Goals	2015 Actual Conditions
Caney Creek	22.47	20.41
Upper Buffalo	22.51	19.96

Therefore, contrary to the Conservation Groups' claims, extending the time necessary for the completion of settlement negotiations will not jeopardize continued attainment of those goals.

13. Consequently, it is appropriate for to the Court to continue to hold this litigation in abeyance until, at least, July 24, 2017.

14. To reiterate a point raised by EPA in its response filed today—while settlement discussions with one or more parties may ultimately be unsuccessful, EPA is not obligated to reach a resolution with all parties. Any settlement agreement, including any further administrative proceedings that arise from the settlement, will be open to the public process. With the litigation held in abeyance, EPA has been able to focus its resources toward facilitating the settlement discussions.

15. Thus, a continued abeyance is in the interest of judicial economy because the alternatives being discussed could eliminate the Court's obligation to address the issues raised in the pending motions and briefs. *See Cottrell v. Duke*, 737 F.3d 1238, 1248 (8th Cir. 2013); *Lunde v. Helms*, 898 F.2d 1343, 1345 (8th Cir. 1990). A continued

abeyance will allow the parties' to continue to focus limited resources toward settlement..

For all these reasons, the parties to this Response request that the Court continue to hold this litigation in abeyance. The parties propose July 24, 2017, as the deadline for their next status report.

Dates: June 22, 2017

Respectfully submitted,

/s/Jamie L. Ewing

Nicholas J. Bronni
Deputy Solicitor General

Jamie L. Ewing
Assistant Attorney General
Office of the Arkansas Attorney
General
323 Center St., Suite 200
Little Rock, AR 72201
(501) 682-5310
jamie.ewing@arkansasag.gov
*Counsel for Petitioner State of
Arkansas*

/s/ Mark Walters
Mark Walters
Jackson Walker, LLP
100 Congress Ave., Ste. 1100
Austin, TX 78701
(512) 236-2360
mwalters@jw.com
Counsel for Petitioner Arkansas
Affordable Energy Coalition

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Fed. R. App. P. 27(d)(2)(A) because, excluding the parts listed in Fed. R. App. 32(f), it contains **1,362** words as counted by Microsoft Word. This document also complies with typeface and type-style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface in 14-point Century Schoolbook font.

Dated: June 22, 2017

/s/Jamie L. Ewing
Jamie L. Ewing

CERTIFICATE OF SERVICE

I hereby certify that the above motion was filed through the Court's CM/ECF system on June 22, 2017, which will serve all registered counsel.

/s/ Jamie L. Ewing
Jamie L. Ewing